Ownership & Occupancy of Accessory Dwelling Units: A Study for Nashville

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Introduction

The purpose of this report is to provide recommendations regarding Nashville's current Detached Accessory Dwelling Unit (DADU) ordinance, specifically ownership and occupancy requirements. The primary question is, are owner and occupancy requirements for detached accessory dwelling units an asset to historic residential neighborhoods? If so, is the MHZC the appropriate department to review and enforce such requirements? This study was undertaken to assist with a larger project to provide better guidance to applicants and the Commission regarding design requirements for outbuildings. It is not the intent of this study to address Short Term Rentals or whether or not DADUs are appropriate for properties zoned single-family, two issues that have arisen in recent years when discussing the DADU ordinance, as they are issues that are not specific to historic overlays and existing zoning.

Accessory dwelling units (ADUs) come in various forms: detached accessory dwelling units (DADUs) attached accessory dwelling units (AADUs), owner accessory units (OAUs), and secondary apartment units. These types of dwellings became popular ways to add density in cities and provide extra income for homeowners. Yet, as city centers become more popular places for renters and buyers, developers have also started to buy lots with room for ADUs or demolish existing buildings on lots in order to build a new principal structure and ADU, thus creating two streams of rental revenue. Several cities now ban absentee landlords from renting out an ADU. Instead, these laws and ordinances mandate the owner of the lot live in either the principal structure or the ADU. While these mandates create a legal backing for tenants of ADUs, the guidelines and codes for many of the cities

do not include a way to enforce or check to ensure the principal structure or ADU is in fact owner-occupied.

The Federal Housing Authority's *Single Family Housing Policy Handbook* defines an accessory dwelling unit as "a habitable living unit added to, created within, or detached from a primary one-unit Single Family dwelling, which together constitute a single interest in real estate."[1] An individual city or municipality may tweak the language of the definition slightly, but the basic premise of an ADU as a living unit in addition to a primary structure remains the same across the different case studies presented in this report. The case studies are California's state law, Oregon's state law with Portland and Keizer as case studies, Boulder, Colorado, and Seattle, Washington.

Summary of ADU PROs and CONs

Potentially Provides:	**Concerns:**
Affordable or accessible housing	Absentee landlords
Diversity of housing options which often equates in diversity in neighborhoods	Increased traffic and parking issues
An increase in STRs which some believe have a positive impact on a neighborhood	An increase in STRs which some believe have a negative impact on a neighborhood
Extra income to owners	
Additional density in a manner that preserves neighborhood and historic character	Additional density often means an increase in traffic
Reduce displacement	

[1] U.S. Department of Housing and Urban Development, *FHA Single Family Housing Policy Handbook* (Washington, D.C., 2016), accessed November 27, 2018, https://www.hud.gov/sites/documents/40001HSGH.PDF.

Background

Metro Historic Zoning Commission and the Planning Commission developed a DADU ordinance, sponsored by Councilmembers LaLonde, Gilmore, Evans, Holleman, Hollin, Jameson and Moore in 2011. The standards of the DADU ordinance were developed by both departments in consultation with councilmembers and neighborhood leaders. In addition to bulk standards and design guideline standards, the ordinance did not allow the two units to be sold separately, as they would be if they were attached, and required the owner live in one of the two units. The ownership requirement is enforced through the requirement of a filed restrictive covenant. In 2014, the Planning Commission extended the ordinance, sponsored by Councilmember Hunt, to allow for a DADU in any UDO. In 2014, the DADU ordinance was revised to allow for larger buildings in terms of height and footprint size.

Initially, "two-family zoning" meant that two attached dwelling units form a single structure connected by not less than eight feet of continuous floor, roof and walls. The two units could be sold separately as a "horizontal property regime." In order to maximize profits, developers began constructing two separate single-family structures on one lot but with a minimal connecting space between to the meet the

Example of "umbilical cord" connector.

attachment requirement and selling them separately. In 2008, the definition of "two-family" was amended (BL2008-115) to allow two structures to be to detached units, thereby doing away with the odd "umbilical cord" type of development. Current definition of "two-family is as follows:

> 1. Two attached dwelling units forming a single structure connected by not less than eight feet of continuous floor, roof and walls; or
>
> 2. Two detached dwelling units separated by at least ten feet. Notwithstanding the foregoing, two detached dwelling units within a historic zoning overlay district shall not be permitted, and two detached dwelling units within the urban zoning overlay shall not be permitted unless the current use is legally non-conforming in an RS zoning district within the urban zoning overlay, but not within a historic zoning overlay. When two detached dwelling units are constructed on a single lot within the R zoning district, such lot may only be subdivided if the resulting lots are limited to single family use.

By filing a Horizontal Property Regime (HPR), which is similar in definition to a condominium in that there is joint ownership of the property through deed, property owners are able to sell units separately. Nashville's DADU ordinance places a restriction on selling either unit separately; however, because two separate full-size detached homes are allowed on lots zoned two-family, the DADU ordinance is almost obsolete, except in historic overlays where two full-size homes typically does not meet the historic context. Other cities have different definitions for "two-family" or "duplexes" so a direct comparison as to whether or not a DADU can be sold separately, if not specifically noted in the DADU

ordinance itself, is challenging. Many cities require that one of the two units be owner-occupied, which would likely result in the inability to sell the units separately.

California

In 2016, California Governor Jerry Brown signed three pieces of legislation regarding accessory dwelling units: AB-2406, AB-2299, and SB-1069. The three bills worked together to establish state-wide regulations for building and regulating new ADUs. AB-2406 Housing: junior accessory dwelling units authorized local agencies to create an ordinance for JADUs, or secondary units no more than 500 square feet, on both single-family and multi-family zoned residential areas. (JADUs are similar to Nashville's DADUs, in that they are detached dwelling units.) Portions of the bill list the requirements for occupancy and ownership of junior accessory dwelling units. For instance, the state requires owner-occupancy when the junior accessory dwelling is permitted. The owner is allowed to live in either the single-family residence or the new portion of the junior accessory dwelling. The only exceptions to the owner-occupancy rule are if a government agency, land trust, or housing organization is the owner of the single-family residence. Furthermore, to ensure owner-occupancy, California requires deed restrictions be placed on junior accessory dwelling units. The deed restrictions must include the ban of the sale of the accessory unit as separate from the single-family residence and a restriction on the size of the accessory unit.[2] The other two bills, AB-2299 and SB-1069 did not include specific

[2] A.B. No. 2406, Sess. of 2015 (Cal. 2015), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB2406.

language on the sale of ADUs nor occupancy, other than to state that local ordinances can require owner-occupancy and require ADUs be long-term rentals of more than thirty days.[3]

The following year, two statutes were passed, SB-229 and AB-494, which amended the 2016 law. The two pieces of legislation were enacted specifically to ease the language surrounding the process by which single-family residence owners could build an ADU and therefore promote the construction of ADUs.[4] The two bills amended the state code such that local agencies were given permission to create ordinances for accessory dwelling units so long as ADUs are not sold separate from the primary residence nor deeded separately from the primary residence. ADUs can only be rented separately from the primary residence on the single-family or multifamily lot. However, the 2017 update to the state code granted city governments more leeway in deciding whether or not owner occupancy is required for either the primary or accessory dwelling unit.[5]

The state of California represents an interesting case study of ADU laws and guidelines. The government enacted a state-wide law for cities to create ordinances for accessory dwelling units in 2016. A year later, in the face of an affordable housing shortage, California lawmakers reevaluated the law and loosened restrictions to make it even easier for homeowners to construct ADUs. Municipalities may restrict ADUs to owner-occupancy, much like JADUs. However, the state does not require owner-occupancy. Additionally, the state law still mandates that ADUs cannot be sold separate from the single-family unit on the lot.

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[3] A.B. No. 2299, Sess. of 2015 (Cal. 2015), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB2299; S.B. 1069, Sess. 2015 (Cal. 2015), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160SB1069.

[4] "Accessory Dwelling Units (ADUs)," California Department of Housing and Community Development, accessed November 15, 2018, http://hcd.ca.gov/policy-research/AccessoryDwellingUnits.shtml.

[5] Memorandum from Zachary Olmsted to Planning Directors and Interested Parties, May 29, 2018, Sacramento, CA, Department of Housing and Community Development, Division of Housing Policy Development.

In Santa Maria, California, the Planning Department shot down the first vote for making owner-occupancy a requirement for an ADU permit.[6] Owner-occupancy often equates to whether or not a developer, LLC, or other non-personal entity owns and rents out both the primary and accessory dwellings. In Santa Maria, Planning staff recommended the Planning Commission adopt the owner-occupancy rule. However, the commission raised concern over multiple issues. How would the rule be enforced? Can a renter get kicked out of an ADU rental if a new owner breaks the law? Can an immediate family member live in the house after the owner moves, but still remains the owner? To these questions, planning staff discussed local concerns about the changing look and character of single-family zoned neighborhoods. However, they did not immediate answers to the questions about evictions or next-of-kin occupancy. Additionally, the Planning Department admitted that they would not be conducting inspections to ensure owner-occupancy. Instead, they would wait until codes or the police receive information on a violation. Then, they would start the fining process of $1,000/day for breaking a zoning code. Ultimately, the Santa Maria Planning Commission did not initially include the owner-occupancy rule in 2017.[7]

[6] "November 15, 2017 – Planning Commission Meeting," Youtube video, 2:18:43, posted by City of Santa Maria, California, November 16, 2017, https://youtu.be/eGbhpkHC4wM.

[7] "November 15, 2017 – Planning Commission Meeting."

Oregon

In 2018, the state of Oregon passed a new law to loosen restrictions on their land use code. The state mandates that any municipality with more than 2,500 inhabitants must allow for accessory dwelling units. Portland and Keizer offer two case studies on how the Oregon law has been implemented or will be implemented. Portland is known for its loose rules on ADUs. There is no owner-occupancy rule except in the case of short-term rentals. Furthermore, the City of Portland allows for up to two ADUs on a lot, one detached and one attached.[8]

Keizer, a smaller city writing their ADU ordinance, recently voted to keep owner-occupancy in their rules. In Keizer, the Planning Commission debated and voted on the language for an ADU ordinance in November 2018. The city had allowed for ADUs since 1998, but had not been a particularly popular form of housing.[9] Due to Oregon's new law, the city has to rework some of the language within their current code in order to match the state's code. Previously, the city code called accessory dwelling units "shared housing facilities," not to be mistaken with multi-family housing or apartments.

The Planning Commission and staff debated the owner-occupancy rule over two meetings in October and November. Repeated concerns include neighborhood character, short-term rentals, and who qualified as an owner. The neighborhood character question raised concerns primarily about parking, and what ADUs would do to the streetscape if more cars needed on-street parking. Short-term rentals, like Airbnb, were also of concern, to which Planning staff said they would regulate use for STRs, but nearby Salem, OR wrote

[8] City of Portland Bureau of Development Services, "Accessory Dwelling Units," revised June 22, 2016.

[9] "Keizer Planning Commission 10-10-18," Youtube video, 1:30:54, posted by Keizer TV, October 10, 2018, https://youtu.be/XaGQVjXRQXA.

the ordinance to exclude STRs in ADUs. The question of who constitutes an owner also came up in regards to next-of-kin or children. One commissioner asked what would happen if a parent owned the lot and allowed their child to live in either the primary or accessory dwelling while renting out the other. Technically, the owner would not occupy either dwelling. The Planning staff replied that the owner would have to live on the parcel, even in that situation.[10]

The Planning Commission and staff are still working on the Kaiser ADU ordinance and the language of the ordinance has yet to reach their Council. At the November 14 meeting, the Commission did vote to keep the owner-occupancy rule in the ordinance as they moved forward.

[10] "Keizer Planning Commission 10-10-18," Youtube video, 1:30:54, posted by Keizer TV, October 10, 2018, https://youtu.be/XaGQVjXRQXA; "Keizer Planning Commission 11-14-18," Youtube video, 1:15:22, posted by Keizer TV, November 14, 2018, https://youtu.be/9qe51Gt7xXk.

Colorado

Boulder, Colorado has two types of accessory dwellings: accessory dwelling units (ADUs) and owner accessory units (OAUs). ADUs are typically built within a single-family detached dwelling unit, either in an attic or a basement. OAUs are typically attached to the exterior of the single-family unit or located in a separate, accessory building. Some OAUs are similar to Nashville's DADUs in that they can be detached accessory dwelling units.

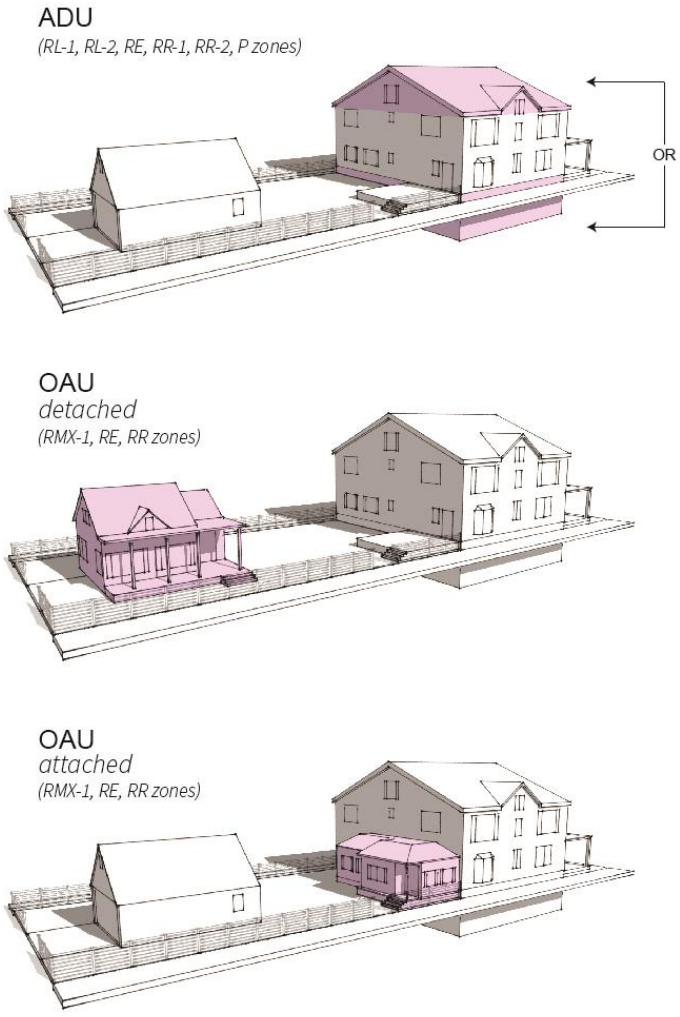

Figure 1. ADU and OAU diagram. ***Courtesy of BoulderColorado.gov.***

ADUs and OAUs are allowed in differently zoned areas. OAUs are only allowed in Residential – Rural, Residential – Estate, and Residential – Mixed zoned districts.

Furthermore, they are only allowed on lots that contain one detached single-family dwelling in any of the three types of zoning areas. Both types of accessory units are strictly permitted to owner-occupiers. The owner of the lot must live in either the accessory unit or the primary structure based on Boulder's residential use standards.[11]

Washington

In Seattle, Washington, rapid movement into the city due to an increase in tech industry jobs caused an affordable housing shortage. The so-called housing crisis led Mayor Ed Murray to implement the Housing Affordability and Livability Agenda (HALA) in 2014.[12] The aim of HALA, which passed through Seattle's City Council the next year, is to up-zone certain single-family districts in order to construct more multi-family units and provide more affordable housing options in an attempt to abate displacement. While controversial, the HALA program's rezoning initiative is still undergoing implementation in the city in order to increase housing choices across the city.[13]

One way that Seattle attempted to abate displacement and provide residents with more housing choices included ADUs and DADUs. ADUs, which are allowed in single-family zoned districts as well as single-family homes, row houses, or townhouses in low-rise zoned districts, are attached to the principal dwelling. For all eligible zones, Seattle

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[11] City of Boulder Planning and Development Services Center, "Accessory Dwelling Unit: Attachment to *Administrative Review Application*" March 2013, https://www-static.bouldercolorado.gov/docs/PDS/forms/103_attachment.pdf?_ga=2.95101909.87018411.1543347318-707017166.1542290420.

[12] "HALA History," Seattle.gov, accessed November 28, 2018, https://www.seattle.gov/hala/about.

[13] "Mandatory Housing Affordability (HALA)," Seattle.gov, accessed November 28, 2018, https://www.seattle.gov/hala/about/mandatory-housing-affordability-(mha)#REZONES.

requires the owner to live in either the principal or accessory dwelling as a permanent resident. The owner-occupant must live in either dwelling at least six months out of the year. A signed and notarized owner-occupant covenant must be filed with King County as well. A waiver proving "good cause" must be filed in order to waive the owner-occupancy requirement, but the waiver is limited to three years.[14]

Similar to attached accessory dwelling units, detached accessory dwelling units also require owner-occupancy in one of the two structures, whether the principal or the accessory. If an owner is found in violation of the owner-occupancy rule, the city can require the owner to re-occupy one of the buildings, remove the detached accessory dwelling, or provide a "good cause" for the waiver.[15]

However, a recent Environmental Impact Study conducted by the city on accessory dwelling units revealed the Council's movement towards removing the owner-occupancy rule for constructing new ADUs and DADUs. For an owner to build a second ADU on the same lot, at least one year of ownership would need to be proved.[16] The Queen Anne Community Council filed an appeal of the EIS for ADUs. Changing neighborhood character and zoning are their primary reasons for the appeal.[17] Final remarks for the case have not been read at the time of this report. A decision should be made in late April 2019.

In 2019, the Washington State legislature began hearing House Bill 1797. The statewide bill, if approved, would be similar in nature to the California state bill. The first

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[14] Seattle Department of Construction and Inspections, "Establishing an Attached Accessory Dwelling Unit," July 17, 2018, http://www.seattle.gov/DPD/Publications/CAM/cam116a.pdf.

[15] Seattle Department of Construction and Inspections, "Establishing a Backyard Cottage," February 8, 2016, http://www.seattle.gov/DPD/Publications/CAM/cam116b.pdf.

[16] City of Seattle, *Accessory Dwelling Units Final Environmental Impact Statement*, October 18, 2018, pg. 2-4.

[17] *In Re: The Appeal of the Queen Anne Community Council of the Final Environmental Impact Statement for the Citywide Implementation of ADU-FEIS*, W-18-009 (Hearing Examiner of the City of Seattle, 2018).

reading of the bill occurred in February. At the time of this report, a decision had not yet been made. In the "Findings and Intent" section, the bill sponsors stated the state is experiencing a housing affordability crisis, and accessory dwelling units typically provide additional affordable housing options. The bill would allow local governments to enact their own rules and amendments, given that they followed the regulations set out in the state bill. The state would require cities of 10,000+, portions of cities of 2,500+ with a transit service district, and counties of 15,000+ to allow accessory dwelling units on all lots zoned single-family, or with a duplex or triplex. The current version of the bill encourages cities of 100,000+ to not require owner-occupancy. [18]

[18] Second reading of Sub. H.B. No. 1797, Sess. of 2019 (Wash. 2019), http://lawfilesext.leg.wa.gov/biennium/2019-20/Pdf/Bills/House%20Bills/1797-S.pdf#page=1.

Recommendations

Ownership equates to whether or not the two buildings are owned separately and occupancy often equates to whether or not the owner must live in one of the two units. In places like Keizer and Boulder, the owner-occupancy rule meant the owner of a lot with a primary and accessory dwelling must live in either of the dwellings, which equates to an ownership restriction as well. Yet, in places like Santa Maria, California, the Planning Department shot down the first vote for making owner-occupancy a requirement for an ADU permit. In Nashville, the DADU ordinance when applied to historic overlays is seen as a detriment since second units constructed elsewhere do not need to conform to the DADU design standards and the two units can be sold separately. Although many cities have

Local zoning now allows for a full-size house-behind-a-house outside of a historic overlay, which means that the DADU ordinance is rarely used. The above lot illustrates the impact of current zoning. The 1.5, 2500 square foot story building on the left faces the street and there is a 3-story, 3500 square foot, building behind it, on the same lot.

ownership and owner-occupancy requirements, they are struggling with various aspects of the requirement and considering changes. A study of these cities reveals the following considerations of any ownership-occupancy requirement:

- How to define "owner occupancy"
- How to enforce owner occupancy
- Would enforcement of a situation where the owner is found not to live on site, would that mean the displacement of the renters
- How can ownership be inspected and by whom
- Should an ownership clause be a part of the MHZC's duties

Having the owner live in one of the two-units may initially appear to be very clear language but what about when an owner only lives on the property for 3 months of each year, or six months? Would that be considered "owner occupied." What if an elderly owner moves to a nursing home and her adult children move onto the property? Is that considered "owner-occupied? If the owner-occupancy requirement is retained, a clear definition of what ownership means is recommended.

The owner-occupancy rule for DADUs prevents both the primary and accessory dwelling from being rented at the same time, an issue that could block affordable housing and lead to displacement of long-term homeowners in gentrifying areas of Nashville. The rule also ensures that the owner will have oversight of the rented structure. This leads to more questions. What if an owner is found to be non-compliant? Will the renters be displaced due to no fault of their own? Which Metro Department will conduct inspections and if it is not MHZC, is the other department willing to take on such a responsibility? How will the inspections be conducted and how will the owner be required to prove they live

on-site? How will staff get owners to comply? In terms of inspections, Santa Clara, CA admitted that they would not inspect lots for occupancy but instead respond to requests for code enforcement. Currently there are many ordinance requirements that Nashville deals with in the same manner as it is unfeasible to have enough staff to proactively inspect properties. It may be unrealistic to assume that an occupancy requirement could reasonably be regularly inspected.

Lastly, the MHZC should consider whether or not an occupancy requirement should be under their purview, regardless of whether it is appropriate or not. The ordinance outlines the duties of the MHZC as the creation of historic overlays and the establishment of design review guidelines. The ordinance also provides the following purpose and intent for historic overlays.

> 17.36.100: The historic overlay district provisions are established by this title to insure the ongoing preservation of structures of historic value to Metropolitan Nashville and Davidson County pursuant to the authority contained in Section 13-7-401 of the Tennessee Code Annotated. The provisions of this title are intended:
>
> A. To preserve and protect the historical and/or architectural value of buildings, structures or areas of significant importance;
>
> B. To regulate exterior design, arrangement, texture and materials proposed to be used within the historic districts to insure compatibility;
>
> C. To create an aesthetic appearance, which complements the historic buildings or other structures;
>
> D. To stabilize and improve property values;
>
> E. To foster civic beauty;

F.To strengthen the local economy; and

G.To promote the use of historic districts for the education, pleasure and welfare of the present and future citizens of Nashville and Davidson County.

(Ord. 96-555 § 9.3(A), 1997)

Does an owner-occupancy requirement preserve historic character? Is it related to exterior design issues, aesthetic appearance or civic beauty? Does it help the overlay to improve property values? Does it promote the use of a building? It may or may not be a factor in determining an individual property's values, but generally the overlays are not about individual properties but instead the overall character and health of the neighborhood.

Metro Historic Zoning Commission needs to consider the DADU regulation's primary purpose in Nashville's historic districts. Is it about affordable housing, more housing choices, increasing density in an appropriate manner, providing additional income to the owner or reducing displacement? In places like California and Seattle, Washington, the affordable housing crisis has forced cities to amend their codes to loosen restrictions on ADUs, including getting rid of the owner-occupancy rule. Additionally, the MHZC should consider the ultimate purpose of an owner-occupancy requirement and if that purpose fits into the purview of the MHZC.

It is recommended to remove the owner-occupancy requirement from purview of the Metro Historic Zoning Commission and leave the issue the broader city to consider due to the challenges of defining and enforcing such a rule and because ownership does not

affect the historic integrity and character of a neighborhood. Metro Historic Zoning should not be in the business of managing or stewarding use-related issues.

Comparison Chart

City	Owner-occupancy requirement?
Norwalk, CA	Owner-occupied
San Diego, CA	Owner-occupied
Boulder, CO	Owner-occupied
Barnstable, MA	Owner-occupied
Lexington, MA	Owner-occupied
Keizer, OR	Owner-occupied
Portland, OR	No owner-occupancy
Chattanooga, TN (draft)	Owner-occupied
Austin, TX	No owner-occupancy
Seattle, WA	No owner-occupancy
Madison, WI	No owner-occupancy